HARRIS SOLID STATE (M) SDN. BHD. & ORS.

v.

BRUNO GENTIL PEREIRA & ORS.

COURT OF APPEAL, KUALA LUMPUR
TUAN GOPAL SRI RAM JCA
DATO' ABDUL MALEK AHMAD JCA
DATUK MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: W-04-109-95]
27 SEPTEMBER 1996

CIVIL PROCEDURE: *Pleadings - Whether statement of case directed against 1st appellant only - Whether necessary to file statement of case against added parties - Whether necessary to amend original statement of case.*

LABOUR LAW: *Trade union - Closure of operations of company - Offers of employment with another subsidiary - Effect of destroying union - Whether dismissals without just cause or excuse.*

COMPANY LAW: *Separate legal entity - Whether subsidiaries are separate entities - Whether they have functional unity or integration - Whether veil of incorporation should be lifted - Industrial Relations Act 1967, s. 30(5).*

LABOUR LAW: *Employment - Whether closure of company genuine and bona fide - Whether closure was an unfair labour practise - Whether aimed at punishing employees for legitimate trade union activities - Industrial Relations Act 1967, s. 10(2).*

ADMINISTRATIVE LAW: *Judicial review - Certiorari - Whether only to determine appeal - Whether includes determining appropriate order - Whether remitting case to Industrial Court proper - Courts of Judicature 1964, s. 69(4) - Rules of the Court of Appeal 1994, r. 76.*

The three appellants herein are subsidiaries of a common holding company, Harris Corporation Inc ('HCI'). The respondents are members of the in-house union ('the union') of the 1st appellant. HCI had acquired the 1st appellant prior to the registration of the union.

HCI resented the union and refused to accord recognition to it despite the advice of the D-G of Industrial Relations ('the DGIR') and the subsequent direction of the Minister. Instead, HCI shut down the operations of the 1st appellant, terminated the services of the respondents, and offered them

contracts of employment with the 2nd appellant - all of which were actions that would denude the union of its membership.

Thereafter, the union took out a summons seeking, *inter alia*, declarations that: (i) the termination of employment and the subsequent re-employment were in contravention of s. 10 of the Industrial Relations Act 1967 ('the Act'), illegal, and, therefore, void; and (ii) the respondents have been and continue to be, at all material times, in the employ of the 1st appellant. The 2nd appellant then applied to strike out the respondents' summons. This application to strike out was allowed by the High Court.

The respondents then represented to the DGIR that the termination of their services amounted to dismissals without just cause or excuse. The representations were referred by the DGIR to the Minister who then referred them to the Industrial Court ('the IC').

The IC then handed down an interim award ('the first award') whereby the 2nd and 3rd appellants and the union were added as parties to the proceedings. The 1st appellant applied to the High Court for leave to issue an order of *certiorari* to quash the first award. This application was disallowed.

The 2nd and 3rd appellants then applied to the IC to have themselves struck out as parties to the proceedings. This application was refused ('the second award'). The 2nd and 3rd appellant's applied to the High Court to have the second award quashed by *certiorari*. This application was refused. In handing down the second award, the IC had found that the appellants are all part of a single entity.

The IC then handed down its main award ('the third award') holding that the appellants had acted with propriety and that there was no merit in the respondents' claim that they had been dismissed without just cause or excuse. The respondents' applied for an order of *certiorari* to quash the third award. This application was successful. In quashing the IC's order, the High Court held that the third award was jurisdictionally bad for 'Wednesbury unreasonableness', ie, the closure of the 1st appellant was neither genuine nor a *bona fide* exercise of managerial power. The trial Judge also ordered the matter be remitted to the IC for reconsideration. The appellant appealed.

Held:

Per Gopal Sri Ram JCA (delivering the judgment of the Court):

[1] The test for adding other parties must be whether they will make adjudication effective and enforceable. This test was satisfied here, as the identity of the employer was very much in issue. Besides, as the

1st appellant had failed to object to such additions earlier, it was now too late for the appellants to argue otherwise.

[2] The distinction between errors of law that go to jurisdiction and those that do not has been abolished. A public decision-maker has no jurisdiction to make an error of law.

[3] The right to serve an employer in gainful employment is both a proprietary and a fundamental right.

[4] The Court is willing to lift the veil of incorporation when the justice of the case so demands. Also, s. 30(5) of the Act requires the IC to have regard to the substantial merits of the case rather than the technicalities, and to decide a case in accordance with equity and good conscience.

[5] The corporate veil that masked the three appellants must be lifted as they are part and parcel of one and the same organisation, with functional unity or integration. The finding of the IC that they are separate entities proceeded upon a serious error of law and was unreasonable in the Wednesbury sense.

[6] As the appellants had elected not to commence proceedings for judicial review in the earlier *certiorari* proceedings, it would now be manifestly unjust for them to contend the case on the merits.

[7] When a decision is attacked on grounds of 'Wednesbury unreasonableness', the Court, in judicial review proceedings, is not merely confined to an examination of the decision-making process, but may go into the merits of the decision itself.

[8] It is a question of fact, whether the closure of the 1st appellant's business and the offers of employment were *bona fide* exercises of managerial power in reorganisation, or, for a collateral purpose aimed at victimising the respondents for their participation in trade union activities. On the facts, it was an unfair labour practise, aimed at depriving the respondents of their fundamental right to earn a livelihood; amounting to dismissals without just cause or excuse, destroying the union, and punishing them for their legitimate trade union activities. Such actions contravened s. 10(2) of the Act.

[9] Since the appellants relied on the closure of the 1st appellant's business as the ground for terminating the services of the respondents, the burden was upon them to prove it. On the facts, it was unproved.

[10] If the application for *certiorari* was approved, the power of the Court under s. 69(4) of the Courts of Judicature Act 1964 and r. 76 of the

Rules of the Court of Appeal 1994 was wide enough, not only to determine the appeal, but also to make any order which the lower Court ought to have made or other appropriate orders to ensure that complete justice is done. The power includes making consequential orders even after dismissing an appeal. If the Court merely granted *certiorari* to quash the award and remit the matter back to the IC, it would prolong the dispute and increase expenses, resulting in grave injustice to the claimants.

[11] There is no clearer case of victimisation and unfair labour practices than the instant one. Only orders of re-instatement would be the just and proper remedy.

[Appeal dismissed; orders of re-instatement granted to respondents]

*[**Bahasa Malaysia** Translation of Headnotes]*

PROSEDUR SIVIL: *Pliding - Samada pernyataan kes ditujukan kepada perayu pertama sahaja - Samada perlu fail pernyataan kes terhadap parti-parti tertambah - Samad pernyataan kes asal perlu dipinda.*

UNDANG-UNDANG BURUH: *Kesatuan pekerja - Penutupan operasi perniagaan syarikat - Tawaran pekerjaan dengan syarikat subsidiari - Kesan memusnahkan kesatuan pekerja - Samada pembuangan kerja tanpa sebab adil atau alasan.*

UNDANG-UNDANG SYARIKAT: *Entiti berlainan - Samada subsidiari-subsidiari adalah entiti berlainan - Samada mereka mempunyai fungsi bersatu atau integrasi - Samada tabir pemerbadanan harus dialih - Akta Perhubungan Perusahaan 1967, s. 30(5).*

UNDANG-UNDANG BURUH: *Pekerjaan - Samada penutupan operasi syarikat tulen dan bona fide - Samada penutupan itu satu amalan buruh yang tidak adil - Samada ia bertujuan menghukum pekerja kerana aktiviti sah dalam kesatuan sekerja - Akta Perhubungan Perusahaan 1967, s. 10(2).*

UNDANG-UNDANG PENTADBIRAN: *Kajian semula penghakiman - Certiorari - Samada hanya untuk menentukan rayuan - Samada termasuk penentuan perintah bersesuaian - Samada penghantaran balik kes ke Mahkamah Perusahaan bersesuaian - Akta Mahkamah Kehakiman 1964, s. 69(4) - Kaedah-kaedah Mahkamah Rayuan 1994, A. 76.*

Ketiga-tiga perayu disini merupakan subsidiari-subsidiari satu syarikat pegangan bersama, Harris Corporation Inc. ('HCI'). Responden-responden adalah ahli-ahli kesatuan dalaman perayu pertama. HCI telah memperolehi perayu pertama

sebelum pendaftaran kesatuan tersebut. HCI berasa marah terhadap kesatuan tersebut dan enggan memberi pengiktirafan kepadanya walaupun dinasihati oleh Ketua Pengarah Perhubungan Perusahaan dan arahan selanjutnya oleh Menteri berkenaan. Sebaliknya, HCI telah menutup operasi perniagaan perayu pertama, dan menawarkan kontrak pekerjaan kepada pekerja-pekerjanya dengan perayu kedua - tindakan yang mana mengakibatkan pengurangan keahlian kesatuan tersebut. Kemudian, kesatuan tersebut telah mengeluarkan satu saman untuk, di antara lain, pengisytiharan bahawa (i) pemberhentian dan penggajian semula tersebut melanggari s. 10 Akta Perhubungan Perusahaan 1967 ('Akta tersebut'), menyalahi undang-undang, oleh itu adalah tidak sah; dan (ii) responden telah dan kini, pada semua masa yang berkenaan, sedang bekerja untuk perayu pertama. Perayu kedua kemudian membuat permohonan untuk membatalkan saman responden. Permohonan untuk pembatalan tersebut telah dibenarkan oleh Mahkamah Tinggi.

Responden-responden seterusnya telah membuat reprentasi kepada Ketua Pengarah Perhubungan Perusahaan bahawa penamatan perkhidmatan mereka adalah tanpa sebab adil atau alasan. Representasi tersebut telah dirujuk oleh Ketua Pengarah kepada Menteri berkenaan yang mana telah merujuk mereka kepada Mahkamah Perusahaan.

Mahkamah Perusahaan kemudian telah menurunkan award interim ('award pertama') di mana perayu-perayu kedua dan ketiga dan kesatuan tersebut ditambah sebagai pihak kepada prosiding. Perayu pertama telah merayu kepada Mahkamah Tinggi untuk kebenaran mengeluarkan perintah *certiorari* untuk membatalkan award pertama. Permohonan ini telah dibenarkan.

Perayu-perayu kedua dan ketiga kemudian memohon kepada Mahkamah Perusahaan supaya mereka dikeluarkan sebagai pihak kepada prosiding. Permohonan ini telah ditolak ('award kedua'). Perayu kedua dan ketiga seterusnya memohon kepada Mahkamah Tinggi supaya award kedua dibatalkan melalui perintah *certiorari*. Permohonan ini telah ditolak. Ketika menurunkan award kedua, Mahkamah Perusahaan mendapati bahawa kesemua perayu-perayu adalah sebahagian daripada satu entiti.

Mahkamah Perusahaan kemudian menurunkan award utama ('award ketiga') yang memutuskan bahawa perayu-perayu telah bertindak dengan sesuai dan tiada merit di dalam tuntutan responden yang mereka telah ditamatkan tanpa sebab adil atau alasan. Responden-responden telah memohon untuk perintah *certiorari* untuk membatalkan award ketiga. Permohonan ini telah berjaya. Ketika membatalkan perintah Mahkamah Perusahaan, Mahkamah Tinggi memutuskan bahawa award ketiga adalah salah dari segi bidangkuasa kerana 'Wednesbury unreasonableness', iaitu, penutupan perayu pertama tidak tulen dan bukannya satu tindakan kuasa pengurusan *bona fide*. Hakim perbicaraan juga

membuat perintah supaya kes ini dihantar ke Mahkamah Perusahaan untuk pertimbangan semula. Perayu telah merayu terhadap keputusan ini.

Diputuskan:

Oleh Gopal Sri Ram HMR (menyampaikan penghakiman Mahkamah):

[1] Ujian bagi penambahan pihak-pihak lain ialah samada mereka boleh menjadikan adjudikasi berkesan dan boleh berkuatkuasa. Kes ini memuaskan ujian tersebut, kerana identiti majikan menjadi persoalan. Di samping itu, perayu pertama telah gagal membantah kepada penambahan tersebut pada mulanya dan ianya sudah terlewat untuk mereka menegaskan yang sebaliknya.

[2] Perbezaan di antara kesilapan undang-undang terhadap bidang kuasa dan kesilapan yang tidak berkenaan dengan bidang kuasa telah dibasmi. Pembuat keputusan awam tidak mempunyai bidang kuasa membuat kesilapan undang-undang.

[3] Hak untuk berkhidmat kepada majikan dalam pekerjaan berpendapatan adalah satu hak keempunyaan dan asasi.

[4] Mahkamah rela mengalih tabir pemerbadanan apabila keadilan kes memerlukannya. Juga, s. 30(5) Akta tersebut memerlukan Mahkamah Perusahaan memberi perhatian kepada merit substansial sesuatu kes, daripada perkara teknikal, dan memberi keputusan berlandaskan ekuiti dan kesedaran batin.

[5] Tabir perbadanan yang menutupi ketiga-tiga perayu mesti dialih kerana mereka sebahagian daripada organisasi yang sama dengan fungsi bersatu dan integrasi. Pendapat Mahkamah Perusahaan bahawa mereka berentiti berlainan terbit daripada satu kesilapan undang-undang serius dan adalh tidak munasabah dalam ertikata 'Wednesbury'.

[6] Oleh kerana perayu-perayu telah memilih tidak mengambil prosiding untuk kajian semula kehakiman dalam prosiding *certiorari* terdahulu, ianya adalah dengan manifes tidak adil jika mereka mempertikaikannya di atas merit pada masa itu.

[7] Semasa satu keputusan dicabar atas alasan "Wednesbury unreasonableness", kuasa Mahkamah dalam prosiding kajian semula kehakiman tidak sahaja dihadkan kepada pemeriksaan proses membuat keputusan, tetapi juga boleh memasuki merit keputusan tersebut.

[8] Ianya satu persoalan fakta, samada penutupan operasi perniagaan perayu pertama dan tawaran pekerjaan seterusnya adalah satu tindakan

bona fide kuasa pengurusan dalam pengelolaan semula usaha perdagangan, ataupun untuk niat lain dengan maksud menindas responden-responden kerana penyertaan mereka dalam aktiviti kesatuan. Fakta kes ini menunjukkan ianya satu amalan buruh yang tidak adil, bermaksud melucutkan hak asasi mereka terhadap pekerjaan, menyerupai pemecatan tanpa sebab adil atau alasan, memusnahkan kesatuan dan menghukum mereka kerana aktiviti sah mereka dalam kesatuan tersebut. Tindakan sedemikian melanggari s. 10(2) Akta tersebut.

[9] Oleh kerana perayu-perayu bergantung kepada penutupan perniagaan perayu pertama sebagai alasan memberhentikan perkhidmatan responden-responden, beban adalah pada mereka untuk membuktikannya. Pada fakta, ianya tidak dapat dibuktikan.

[10] Sekiranya pemohonan *certiorari* dibenarkan, kuasa Mahkamah, berlandaskan s. 69(4) Akta Kehakiman Mahkamah 1964 dan k. 76 Kaedah-kaedah Mahkamah Rayuan 1994 adalah cukup luas, bukan sahaja untuk menentukan rayuan, tetapi juga untuk membuat sebarang perintah yang Mahkamah bawahan sepatutnya telah memberi atau perintah yang bersesuaian, supaya memastikan keadilan sempurna terlaksana. Kuasa ini termasuk membuat perintah bersesuian walaupun setelah rayuan dibuang. Sekiranya Mahkamah hanya memberi *certiorari* membatalkan award tersebut dan menghantar balik kes ke Mahkamah Perusahaan, ianya akan melanjutkan perselisihan dan menambah perbelanjaan, dan mengakibatkan ketidakadilan kepada yang menuntut-yang menuntut.

[11] Tidak dapat disangsikan bahawa kes ini merupai penindasan dan amalan buruh tidak adil. Hanya perintah pengembalian semula adalah remedi yang adil dan bersesuaian.

[Rayuan ditolak; perintah pengembalian semula untuk perayu-perayu]

Cases referred to:

Sykt. Perjalanan Terus Butterwoth-Kuala Lumpur Sdn. Bhd., Penang v. Transport Workers' Union [1992] 2 ILR 316 ***(refd)***

Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers' Union [1995] 2 CLJ 748 ***(refd)***

*Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor. [1996] 2 CLJ 771****(refd)***

Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan [1996] 1 MLJ 481 ***(refd)***

Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor. [1995] 3 MLJ 369 ***(refd)***

Rama Chandran v. The Industrial Court of Malaysia, Civil Appeal No 02-13-94 (unreported) ***(refd)***

Hochtief Gammon v. Industrial Tribunal AIR [1964] SC 1746 ***(refd)***

Hotel Jaya Puri Bhd. v. National Union of Hotel, Bar & Restaurant Workers & Anor. [1980] 1 MLJ 109 ***(refd)***

Assam Oil Co. Ltd. v. Its Workmen AIR [1960] SC 1264 ***(refd)***
RB Diwan Badri Dass & Ors. v. Industrial Tribunal AIR [1963] SC 630 ***(refd)***
Majlis Perbandaran Seberang Perai v. Tropiland Sdn. Bhd. [1996] 3 CLJ 837 ***(refd)***
Goon Kwee Phoy v. J & P Coats (M) Sdn. Bhd. [1981] 2 MLJ 129 ***(refd)***
Sungei Biak Tin Mines Ltd. v. Saw Choo Theng & Anor. [1970] 2 MLJ 226 ***(refd)***
Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur ILR 44 Cal 759 (PC) ***(refd)***
Ganesh Ram v. Baikunthesh Prasad Singh & Ors. AIR [1951] Pat. 291 ***(refd)***
Muniappa v. Ramasettey & Anor. AIR [1961] Mys. 166 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 69(4)
Civil Procedure Code 1908 (India), O. 41 r. 33
Industrial Relations Act 1967, ss. 10(2), 20(1), 30(5)
Rules of the Court of Appeal 1994, r. 76

For the appellants - V.T. Nathan (Rutheran Sivagnanam with him); M/s. Shearn Delamore & Co.
For the respondents - B. Lobo (R. Sivarasa & Tan Wan Yean with him); M/s. Daim & Gamany

JUDGMENT

Gopal Sri Ram JCA:

We commenced hearing of this appeal on 22 May 1996 and continued listening to argument on 23 May. However, as V.T. Nathan of Counsel for the appellants was unable to complete his oral submissions on 23 May, we adjourned further hearing of the appeal to 12 August 1996. We also directed Counsel on both sides to put a written note of their argument to assist us. Counsel obliged. At the conclusion of the argument on 12 August we dismissed the appeal and made certain orders which we will set out in detail at the conclusion of this judgment.

The brief facts of this case are as follows.

The appellants are all subsidiaries of a common holding company, namely, Harris Corporation Inc. which is a company incorporated in the United States of America ('Harris Inc.'). For convenience we will call them "the Harris Group". In the proceedings before the Industrial Court, the first appellant was referred to as HSSM, the second appellant as HAT and the third appellant as HSM respectively. We will not follow suit. Instead, we will refer to them merely as 'the appellants' and in the order in which they appear in the title to the appeal.

The respondents are twofold. The first to the twenty-first respondents were members of the in-house union in the first appellant, the first to the third respondents being office bearers of the union. The twenty-second respondent

is the union. But it is not really concerned in the appeal. Accordingly, the expression 'the respondents' wherever appearing in this judgment refers only to the first to the twenty-first respondents.

So much for the description of the parties in this appeal.

Now, the first appellant was not always a part of the Harris Group. Prior to its acquisition by Harris Inc. it was known as RCA Sdn. Bhd. We will refer to it as RCA or the first appellant, as the context requires. It changed its name after being acquired by Harris Inc. on 8 November 1988.

Mr. Nathan took us through the rather tortuous path by which RCA became part of the Harris Group. He told us that this was important to the appeal. We do not agree. In fact we find much of the background outlined by him to be wholly irrelevant to the issues that call for ultimate decision. We will therefore omit the recitation of it here and confine ourselves only to the salient facts.

At the time RCA became a part of the Harris Group, there were, at Ulu Kelang, Selangor, two other companies which were wholly owned subsidiaries of Harris Inc. They are the second and third appellants before us. The third appellant manufactured computer chips for military use. The second appellant tested these chips for marketing purposes. RCA also produced computer chips. But it was for commercial and not military use.

As at the date of the acquisition of RCA by Harris Inc., the former's workmen had not been unionised. It was only on 31 January 1989 that an in-house union was registered. By that date, Harris Inc. had acquired RCA. On the very next day, RCA was informed of this.

From the very start, the Harris Group – in truth Harris Inc. – resented the formation of the trade union. It did not want a union on its premises. It laid all sorts of obstacles in the path of the union. The object was to frustrate the union.

The union sought recognition from the first appellant on 23 June 1989. The Director-General of Industrial Relations, on 10 January 1990, advised that recognition be accorded. But the Harris Group declined to accord any recognition to the union. So the union had to resort to the statutory procedure. It applied to the Minister. Both sides put in their submissions and awaited the Minister's decision.

Meanwhile, having received the Director-General's advice, the Harris Group must have realised that an order from the Minister directing recognition was inevitable. It therefore busied itself with the task of destroying the union.

As a first step the second appellant purported to send out letters to individual employees of the first appellant. All these letters are dated 23 January 1990 and say the same thing. It is therefore sufficient to reproduce one of them. This is how it reads.

Offer of Employment

The new building will soon be completed and ready for occupation and commencement of operations.

In accordance with Harris Malaysia's plan of restructuring and reorganising its activities in Malaysia, some of the operations will be transferred to the new building and we are therefore presently getting our manpower requirements organised.

In this connection, we are pleased to offer you employment with Harris Advanced Technology (M) Sdn. Bhd. as specialist production 1 with effect from ... on the following terms and conditions:

1. You will receive your current salary and will be paid bi-monthly;

2. You will/may be required to work rotating shifts;

3. You shall be liable to transfer from Harris Advanced Technology (M) Sdn. Bhd. to Harris Semiconductor (M) Sdn. Bhd. and *vice versa*, and between departments within the company. You shall also be liable to be seconded to any of our associated companies or subsidiaries;

4. All other terms and conditions shall be in accordance with the company employee's handbook, a copy of which is available for your inspection.

We wish to assure you that our terms and conditions of service are no less favourable than those you currently enjoy with Harris Solid State (M) Sdn. Bhd.

Should you accept this offer of employment, your past service with Harris Solid State (M) Sdn. Bhd. shall be treated as service with Harris Advanced Technology (M) Sdn. Bhd. for the purpose of computing benefits based on length of service.

Additionally, with effect from the commencement of employment with us, you shall cease to be an employee of Harris Solid State (M) Sdn. Bhd.

Please indicate your acceptance of this offer by signing below.

Yours faithfully,

Sgd.

The effect of individual workmen of the first appellant accepting this offer would be to denude the union of its membership to the point of non-existence, thereby rendering its presence in the first appellant academic. Mr. Nathan, with

his customary frankness, conceded the point. He said that had the offer been accepted by all the workmen of the first appellant, the union would have ceased to exist.

This offer by the second appellant impaled the union upon the horns of a dilemma. The union was literally fighting for its life. But it could not do anything until the Minister decided on the question of its recognition. It had no standing to act before then. In the meantime, however, the Harris Group was free to effectively terminate the union.

The Minister's order came on 16 April 1990. Quite rightly, he directed the first appellant to recognise the union. The union could now act. And it acted fairly swiftly.

On 19 May 1990, it took out a summons in which it claimed, *inter alia,* the following relief:

> 1. A declaration that the termination of employment of employees of Harris Solid State (M) Sdn. Bhd. by the said company, the first defendant herein, and subsequent re-employment by Harris Advanced Technology (M) Sdn. Bhd., the second defendant herein, on or about 23 January 1990, is in contravention of s. 10 of the Industrial Relations Act 1967, illegal and therefore void;
>
> 2. A declaration that the abovesaid employees, have been and continue to be, for all intents and purposes and at all material times, in the employ of Harris Solid State (M) Sdn. Bhd. and whose recognised and representative trade union is Kesatuan Pekerja-pekerja Harris Solid State (M) Sdn. Bhd., the plaintiff herein.

The second defendant to the summons (second appellant before us) applied to have the action struck out. That application came before Eusoff Chin J (now Chief Justice of the Federal Court of Malaysia) who allowed it and struck out the union's summons. The union had argued that the first and second appellants were one and the same entity for purposes of the Trade Union Act 1959. That argument was rejected by Eusoff Chin J in the following terms:

> I note that w.e.f. 10 February 1989 by Act A717, the Trade Union Act 1959 had been amended to enable a trade union to be formed within any particular establishment (see definition of 'trade union' or 'union' in s. 2 of the Trade Union Act).
>
> The word 'establishment' in s. 2 has been defined to mean:
>
> > any place of business or employment belonging to an employer, and includes any division or branch thereof.

From this it would appear that the plaintiff being a union of workmen who are employed by the 1st defendant, should confine itself to serving the cause of employees of the 1st defendant, and should carry out its union activities within the premises of the 1st defendant only.

The plaintiff alleged that both defendants are not separate establishments since Abdullah is the same human resource manager for both defendants.

I find that the two defendants may be in the same group, i.e. Harris Corporation, but they are different companies, having different places of business. The word 'establishment' as defined, has a wide meaning so that if, for example, a company has different places of business or employment, and has branches all over the country, or has various divisions, employees working in each place of business, branch or division may get together to form a trade union. The activities of such union, however, are confined to such place, branch or division. As such, the activities of the plaintiff including recruitment of members, should only be confined to the establishment and the employees of the 1st defendant.

Nathan relied heavily on the finding that the first and second appellants are separate entities. But it must not be forgotten that the observations of Eusoff Chin J, with which we express our agreement, were made in the very narrow context of the issue he was called upon to determine, namely, whether, having regard to the definitions appearing in the Trade Union Act 1959, the union was entitled to carry on its activities on the premises of the second appellant. His conclusion was not meant to have general application, irrespective of context. And, as will appear later in this judgment, there are compelling reasons for holding that it is too late in the day for the appellants to relitigate this issue.

Returning to the narrative, after the Minister had ordered recognition and while the proceedings before Eusoff Chin J were still pending, the Harris Group practised the charade of collective bargaining with the union. Such collective bargaining began on 22 June 1990, some six months after the letters of offer had been sent out. Unsurprisingly, the negotiations for a collective agreement produced no result.

On 21 September 1990, two sale and purchase agreements were executed. The first was between the first and second appellants; the second between the second and the third appellants. Both agreements contain almost identical terms. By these agreements the second appellant purported to purchase from the first and third appellants all their assets. According to the appellants, these two agreements formed part of a *bona fide* exercise of their managerial power to reorganise themselves for the purpose of integrating the activities of the first appellant with the other appellants. The fact that this would result in the closure of the first appellant was a mere incident of the exercise of that power

with no collateral purpose aimed at the union or its officers, namely, the first to the third respondents.

The respondents, on the other hand, challenged the closure of the first appellant. They said that it was a mere device to cloak the true objective of the appellants, namely, to destroy the union and to victimise the first, second and third respondents for their union activities. They also attacked the two sale and purchase agreements as mere sham. Lobo who appeared for the respondents took us through some of the clauses in the two sale and purchase agreements. He demonstrated that both agreements had no fixed completion date. Counsel also drew our attention to the fact that the contracting parties were in reality one and the same. It was Harris Inc. effecting a sale to itself.

While we will express our views on these arguments in due course, we must, for the moment, proceed with the factual narrative.

On the same day as the date of the impugned sale and purchase agreements, the first appellant terminated the services of the first to the twenty first respondents who were all members of the union. The reason given in the letter of 21 September 1990 written on a letterhead which merely says "Harris" is that the first appellant "will cease operations w.e.f. 22 September 1990 and your [that is, the addressee's] services will no longer be required". 22 September 1990, stated in this letter as being the date of closure, was amended by the appellants in the proceedings before the Industrial Court held on 12 April 1994 to "21 September 1990".

Those affected by the termination resorted to the provisions of s. 20(1) of the Industrial Relations Act 1967 ('the Act'). They made representations to the effect that the termination of their services by the first appellant amounted to dismissals without just cause or excuse. The Director-General of Industrial Relations having failed to effect a reconciliation, referred the representations to the Minister who, very properly, referred them to the Industrial Court, identifying the affected workmen and the first appellant as parties to the dispute.

Following the reference, the respondents delivered their statement of case to which the first appellant delivered its statement of reply. In para. 3 of the former pleading, the respondents challenged their termination. And this is how they put their case:

> The claimants were dismissed with immediate effect without just cause or excuse by the company on 21 September 1990. The claimants say that the company's termination of the employment of the claimants on the purported basis that "the company will cease operations with effect from 22 September 1990" is tainted with *mala fides* and actuated by victimisation and an unfair labour practise.

The first appellant met this allegation in paras. 18.1 and 18.2 of its statement in reply as follows:

> 18.1 The company denies *in toto* the allegations set forth in para. 3 of the statement of case. The company contends and will so submit that it is entitled in law to cease its operations and terminate the services of all its employees including the claimants by the payment of indemnity in lieu of notice and termination benefits.
>
> 18.2 The company avers that it ceased operations by reason of the consolidation and integration of Harris operations into HAT. In any event, the company will contend and so submit that there is a real closure of its operations and that the reasons for the closure are irrelevant to the issue before the Court.

So, at the axis of primary dispute lay the question whether the closure of the first appellant's business was a *bona fide* exercise of managerial power, or whether, as contended by the respondents, it was an unfair labour practise carried out in order to victimise them for their trade union activities. All other questions are merely incidental to this primary question.

On 29 July 1991, the Industrial Court, on an application by the first to the third respondents, handed down an interim award ('the first award') whereby the second and third appellants as well as the union were added as parties to the proceedings before it. The first award makes it clear that although the first appellant strongly objected to the addition of the union as a party, it raised no objections whatsoever to the addition of the second and third appellants. The first appellant applied to the High Court for leave to issue an order of *certiorari* to quash the first award but it proved unsuccessful and was not pursued any further.

After delivering their respective statements in reply, to which the respondents delivered their rejoinder, the second and third appellants applied to have themselves struck out as parties. The Industrial Court, after hearing evidence on the point, refused that application and gave reasons for its decision ('the second award'). The second and third appellants then moved to have the second award quashed. However, the High Court refused *certiorari* and there was no appeal against that refusal.

Because of the way in which the appeal was argued before us, it is important to see what the Industrial Court had to say in the second award. It is reported in [1992] 2 ILR 316. This is what the learned Chairman said (at p. 317):

> These three companies, Harris Advanced Technology (M) Bhd., Harris Semiconductor (M) Sdn. Bhd. and Harris Solid State (M) Sdn. Bhd. were at one time or other under one umbrella organisation – Harris. Call it by any name, the

fact is clear: Harris is the nucleus of a big conglomerate. As time goes, one or more of the companies under its wing may have ceased to function, but Harris still lives on. Harris has a duty to society, and its once upon a time, employees. It is accepted that an international corporate body may from time to time, restructure or reorganise, in keeping with the development and progress of the day, but it still has a responsibility to its workers.

The learned Counsel for the companies was at pain in his presentation to the Court, to dress up a paraphernalia of technicalities and legalities, though impressive it may be, which is groundless. The case must not be entrammelled with technicalities and legalities.

There it is for all to see. A specific finding by the Industrial Court that the three appellants are all part of a single entity. The appellants elected not to take the proceedings for judicial review any further in respect of the second award. Yet, they sought to argue in subsequent proceedings, including in the appeal before us, that the appellants are all separate entities. We are of the view that they cannot be permitted to do this. It would be manifestly unjust to permit them to re-agitate a point which they allowed to pass by their acceptance of the High Court's refusal to quash the second award. In the environment of public law, it would be an irrelevant consideration that ought not to be countenanced in any subsequent proceedings before the Industrial Court.

Returning to the mainstream, the case before the Industrial Court to determine whether there had been a dismissal without just cause or excuse was proceeded with on its merits. After hearing the evidence led on behalf of the appellants and the respondents, the Industrial Court handed down an award ('the third award') in which it came to the conclusion that the appellants had acted with propriety and that there was no merit in the respondents' complaint that they had been dismissed without just cause.

The reasoning of the learned Chairman who heard the case appears sufficiently from the following passages in the third award:

The learned Counsel for the claimants and the union argued that all the three (3) companies (HAT, HSSM and HSM) are for all means and purposes one integral whole and as such there cannot be an 'offer' from one part of an integral enterprise to another part of the same integrated organisation if the Court could lift the corporate veil.

In this respect there was a decision of the High Court by the learned Judge, Hj. Mohd Eusoff Chin, whereby he decided that among other prayers which he allowed, he said that HSSM and HAT are separate companies and he refused to lift the corporate veil because the company is not a wholly-owned subsidiary as in Originating Summons No: R8-24-38-1990 dated 4 January 1991. It should be

noted that HSSM was a newly acquired business and as such HSM and HAT employees were not transferable to HSSM and *vice versa.*

When HAT offered employment to all the employees of HSSM all except 21 claimants did not accept the offer or refused to go along with the other employees to join HAT. They said that the offer was illegal and the company's intention was to bust the union. There was no evidence to their allegation and the company as has been said earlier was a separate company and HAT was never an employer of the claimants. As such it was only proper for HAT to offer them employment and if they refused, which they did, there was nothing that HAT could do. As the claimants were employees of HSSM and since HSSM had ceased operations which it had fundamental right to do in law which this Court considered that it was done *bona fide*, it was right for HSSM to dismiss them and it was considered with just cause... .

Since HSSM had ceased operations which the Court considered as their management prerogative and as there was no evidence to show that it was not done *bona fide*, the Court is of the opinion that the claimants were only interested in their union affairs considered without any merit to interfere with the paramount right of the management (HSSM) to do what was considered best for its business... .

In the opinion of the Court the claimants rejection to join HAT was probably influenced by their union activities which they knew or ought to have known that they could not interfere or stop HSSM of its paramount right to reorganise its business provided it was done *bona fide.* There was no evidence to show otherwise that what HSSM was doing was not done *bona fide* ... .

The High Court under Originating Summons No: R8-24-38-1990 had decided that though HSSM and HAT are in the same group, i.e. Harris Corporation, they are different companies, having different places of business and as such even though Russel Smith, the managing director, and Abdullah Mohd Zain, human resource manager, were the same persons, they were in fact responsible for separate establishments as HAT and HSSM were different companies. The Court did not consider them material witness and neither of them signed the offer letters to the employees of HSSM ... .

It is the decision of this Court that the claimants were not interested in the employment in HAT though the offer was for the better but acted in concert for the interest of the union even though they knew or ought to have known that what HSSM was doing to reorganise itself was its own management prerogative and was done *bona fide.*

The respondents, who were obviously dissatisfied with the result, then moved the High Court for an order of *certiorari* to quash the third award. They succeeded. The learned Judge who heard the application held that the Industrial Court had acted on no evidence when it concluded that offers of employment had been made to the respondents. He also agreed with the respondents'

submission that the third award was jurisdictionally bad for "Wednesbury unreasonableness" in that no reasonable Tribunal similarly circumstanced would have concluded, on the material available, that the closure of the first appellant was genuine and a *bona fide* exercise of managerial power. In the light of the law as it then stood, Counsel for the respondents applied to have the matter remitted to the Industrial Court for consideration afresh. The learned Judge acceded to that application.

It must be remembered that the learned Judge decided the case well before the development of the law upon the subject. The decisions of this Court in *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Workers' Union* [1995] 2 CLJ 748; [1995] 2 MLJ 317, *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor.* [1996] 2 CLJ 771; [1996] 1 MLJ 261 and *Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan* [1996] 1 MLJ 481 were yet to come. The Federal Court was yet to decide *Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor.* [1995] 3 MLJ 369 or to hand down its landmark decision in *Rama Chandran v. The Industrial Court of Malaysia,* Civil Appeal No. 02-13-94 (yet unreported).

The learning contained in these decisions is manifold. First, the distinction between errors of law that go to jurisdiction and those that do not was abolished. It was established that a public decision-maker has no jurisdiction to make an error of law. Second, the right to serve an employer in gainful employment was given its due recognition, not only as a proprietary right but as a fundamental right as well. Third, it was correctly recognised that when a decision is attacked on grounds of "Wednesbury unreasonableness", the Court, in judicial review proceedings, is not merely confined to an examination of the decision-making process but may go into the merits of the decision itself. Lastly, the power of the Court, when moved for prerogative relief, was recognised to be wide enough to mould the appropriate relief according to the circumstances of the case instead of remitting the matter back to the public decision-maker.

Before us, Nathan attacked the judgment of the learned Judge on several grounds. He said, in the first place, that the learned Judge had entered upon the merits of the decision made by the Industrial Court, with particular reference to its finding that the respondents had consciously refrained from accepting the offer of employment made to them by the second appellant. This, Counsel argued, smacks of the exercise of appellate power, which is not within the province of a judicial review Court. Much the same, Counsel submitted, may be said of the finding by the Industrial Court that there had been a *bona fide* closure of the first appellant. His second submission was that the Industrial Court correctly accepted Eusoff Chin J's ruling that the three appellants were

separate entities and that it would be quite wrong, on that basis, to hold that the offer of employment was a sham. Counsel's third submission concerned a point of pleading. He said that the respondents' statement of case, as originally cast, was directed against the first appellant as the employer. After the addition of the second and third appellants as parties to the proceedings before the Industrial Court, the respondents did not file a statement of case against these added parties. Nor did the respondents seek to amend their original statement of case to add a case against the second and third appellants. The question of the second or the third appellant being the employer of the respondents was never put in issue before the Industrial Court. Upon the foregoing premise, it was submitted that the Industrial Court was right in holding that the second appellant was not the respondents' employer.

In answer to these arguments, Lobo of Counsel for the respondent, submitted that the appellants' case when properly viewed rested upon the following two propositions:

(1) There was no functional unity or integration among the three appellants, each being a wholly separate entity;

(2) There was a genuine closure of the first appellant's operations on 21 September 1990.

Counsel submitted that once it was demonstrated that either of these propositions were not watertight, the respondents were entitled to a decision in their favour on the merits. All other considerations, such as whether the second appellant did make an offer to the respondents and whether it was accepted or rejected become irrelevant.

As for the pleading point, which we think may be conveniently disposed of at this stage, Lobo referred us to the denials contained in the respondents' rejoinder filed in the Industrial Court and submitted that the respondents had sufficiently put in issue the question as to whether the second and third appellants were also the employer. We were also referred to *Hochtief Gammon v. Industrial Tribunal AIR* [1964] SC 1746, a decision of the Indian Supreme Court that has, on numerous occasions, been applied with approval by our Courts. Counsel read to us the following passage (at p. 1750) in the judgment of Gajendragadkar CJ which he said reasonably supported the respondents' case:

> If it appears to the Tribunal that a party to the industrial dispute named in the order of reference does not completely or adequately represent the interest either on the side of the employer, or on the side of the employee, it may direct that other persons should be joined who would be necessary to represent such interest. **If the employer named in a reference does not fully represent the interests of the employer as such, other persons who are interested in the**

> **undertaking of the employer may be joined.** Similarly, if the unions specified in the reference do not represent all the employees of the undertaking, it may be open to the Tribunal to add such other unions as it may deem necessary. **The test always must be is the addition of the party necessary to make adjudication itself effective and enforceable?** In other words, the test may well be, would the non-joinder of the party make the arbitration proceedings ineffective and unenforceable? It is in the light of this test that the implied power of the Tribunal to add parties must be held to be limited. (Emphasis added).

In our judgment, the passage above-quoted when applied to the facts of this case provides a sufficient answer to the appellant's submissions on the pleading point.

There is the first appellant's failure to object to the addition of the other appellants as parties to the proceedings before the Industrial Court that culminated in the making of the first award.

There is also the second award which was handed down after the Industrial Court had heard evidence on the point in issue, namely, whether the second and third appellants were necessary parties to the resolution of the dispute. Since their presence was necessary to "make the adjudication itself effective and enforceable", the identity of the employer was very much in issue when the Industrial Court came to hear the dispute on its merits. Indeed, it is for this very reason that the Industrial Court in the third award expressed the view that "the company as has been said earlier was a separate company and HAT was never an employer of the claimants."

For these reasons, we find the so-called pleading point to be singularly devoid of any merit.

Turning now to the other arguments, we must express our agreement with the approach suggested by Lobo to the disposal of this appeal. The two propositions that he has formulated are indeed the sum and substance of the appellants' case. And they should, in our judgment, be resolved against the appellants.

We have already explained the weakness in the argument that was founded upon the judgment of Eusoff Chin J in the originating summons proceedings. As earlier observed, his Lordship's finding was made in the context of the definition contained in the Trade Union Act. On the other hand, there is the express finding by the Industrial Court in the second award – a finding arrived at after hearing evidence – that the three appellants are part and parcel of one and the same organisation. Having failed to impeach the second award in *certiorari* proceedings, it is not open to the appellants to have contended otherwise at the hearing of the case on its merits.

In any event, the facts and circumstances of the case (to which we have alluded earlier in this judgment) called for, if not demanded, that the corporate veil that masked the three appellants be lifted. As Salleh Abas FJ (as he then was) observed in *Hotel Jaya Puri Bhd. v. National Union of Hotel, Bar & Restaurant Workers & Anor.* [1980] 1 MLJ 109, at p. 112:

> It is true that while the principle that a company is an entity separate from its shareholders and that a subsidiary and its parent or holding company are separate entities having separate existence is well-established in company law, in recent years the Court has, in a number of cases, by-passed this principle if not made an inroad into it. The Court seems quite willing to lift 'the veil of incorporation' (so the expression goes) when the justice of the case so demands.

Further, s. 30(5) of the Act imposes a duty upon the Industrial Court to have regard to the substantial merits of a case rather than to technicalities. It also requires the Industrial Court to decide a case in accordance with equity and good conscience. Parliament has imposed these solemn duties upon the Industrial Court in order to give effect to the policy of a democratically elected government to dispense social justice to the nation's workforce. It is therefore our bounden duty to ensure that the Industrial Court applies the Act in a manner that best suits the declared policy of the elected government. Where, as in the present case, there has been an obvious failure to do so, it is for us, the judicial arbiters, to set matters right.

This is precisely what the learned Judge did when he issued *certiorari* to quash the third award. It is clear that he was satisfied that there was, on the admitted and proved facts, functional unity or integration among the three appellants. He was entirely justified in that conclusion. Indeed any reasonable Tribunal faced with the material that was presented to the learned Chairman who handed down the third award would have come to the same conclusion as the learned Judge. This is accordingly a case of "irrationality" or of 'Wednesbury unreasonableness". (See *Rama Chandran's* case, per Edgar Joseph Jr FCJ). The Judge was entitled to delve into the merits of the case. We have done the same and are in agreement with his conclusions.

It follows from what we have said thus far that the finding by the Industrial Court in the third award that the three appellants are separate entities proceeded not only upon a serious error of law but is also an unreasonable decision in the sense in which that expression is used in public law. *Certiorari* was warranted on this ground alone.

We now come to the second proposition on which the appellants' case rests, namely, that there was a *bona fide* closure of the first appellant's operations on 21 September 1990. Implicit in this proposition is the point taken by the appellants in their pleaded case before the Industrial Court and during argument

before us, namely, that it was the managerial prerogative of the appellants to effect a closure. It is an argument that was accepted by the Industrial Court in the third award. And we think that we ought to dispose of it before dealing with the principal contention.

There is, we believe, a complete answer to the point taken. It is this. An employer may re-organise his commercial undertaking for any legitimate reason, such as promoting better economic viability. But he must not do so for a collateral purpose, for example, to victimise his workmen for their legitimate participation in union activities. Whether the particular exercise of managerial power was exercised *bona fide* or for collateral reasons is a question of fact that necessarily falls to be decided upon the peculiar circumstances of each case.

When the proved or admitted facts of a case are such that, when objectively viewed, they would lead a reasonable Tribunal to conclude that the exercise of managerial powers, such as the closure of a business, was for a collateral purpose, aimed at depriving a workman of his fundamental right to earn a livelihood, then, any termination of employment in consequence of such exercise may be struck down as constituting unfair labour practise.

The authorities in support of the view we have expressed are legion. We do not propose to go through them all in this judgment. It is sufficient, for present purposes, to quote from two leading cases decided by the Supreme Court of India in respect of the parallel Indian legislation.

The first is *Assam Oil Co. Ltd. v. Its Workmen* AIR [1960] SC 1264, where Gajendragadkar J, speaking for the majority, said (at p. 1267):

> The wide scope of the jurisdiction of Industrial Tribunals is now well-established. As early as 1949 it was held by the Federal Court in *Western India Automobile Association v. Industrial Tribunal, Bombay* 1949 FCR 321 at p. 336: (AIR [1949] FC 111 at p. 117), that the argument based upon the sanctity and the validity of contracts between the employer and the employees
>
> > overlooks the fact that when a dispute arises about the employment of a person at the instance of a trade union or a trade union objects to the employment of a certain person, the definition of industrial dispute would cover both those cases. In each of those cases, although the employer may be unwilling to do so, there will be jurisdiction in the Tribunal to direct the employment or non-employment of the person by the employer. This is the same thing as making a contract of employment when the employer is unwilling to enter into such a contract with a particular person.
>
> It was also observed that the Industrial Tribunal –

> can direct in the case of dismissal that an employer or employee shall have the relation of employment with the other party, although one of them is unwilling to have such relation (at p. 337).

In other words, the jurisdiction of the Industrial Tribunal to direct reinstatement of a discharged or dismissed employee is no longer in doubt. That being the nature and extent of the jurisdiction of the Industrial Tribunal it is too late now to contend that the contractual power of the employer to discharge his employee under the terms of the contract cannot be questioned in any case.

If the contract gives the employer the power to terminate the services of his employee after a month's notice or subject to some other condition it would be open to him to take recourse to the said term or condition and terminate the services of his employee; but when the validity of such termination is challenged in industrial adjudication it would be competent to the Industrial Tribunal to enquire whether the impugned discharge has been effected in the *bona fide* exercise of the power conferred by the contract. If the discharge has been ordered by the employer in *bona fide* exercise of his power then the Industrial Tribunal may not interfere with it; but the words used in the order of discharge and the form which it may have taken are not conclusive in the matter and the Industrial Tribunal would be entitled to go behind the words and the form and decide whether the discharge is a discharge simpliciter or not. If it appears that the purported exercise of the power to terminate the services of the employee was in fact the result of the misconduct alleged against him then the Tribunal will be justified in dealing with the dispute on the basis that despite its appearance to the contrary the order of discharge is in effect an order of dismissal. The exercise of the power in question to be valid must always be *bona fide*. If the *bona fides* of the said exercise of power are successfully challenged then the Industrial Tribunal would be entitled to interfere with the order in question. It is in this context that the Industrial Tribunal must consider whether the discharge is *mala fide* or whether it amounts to victimisation or an unfair labour practise, or is so capricious or unreasonable as would lead to the inference that it has been passed for ulterior motives and not in *bona fide* exercise of the power conferred by the contract. In some cases the employer may disapprove of the trade union activities of his employee and may purport to discharge his services under the terms of the contract. In such cases, *if it appears that the real reason and motive for discharge is the trade union activities of the employee that would be a case where the Industrial Tribunal can justly hold that the discharge is unjustified and has been made mala fide.* It may also appear in some cases that though the order of discharge is couched in words which do not impute any misconduct to the employee, in substance it is based on misconduct of which, according to the employer, the employee has been guilty; and that would make the impugned discharge a punitive dismissal. In such a case, fairplay and justice require that the employee should be given a chance to explain the allegation weighing in the mind of the employer and that would necessitate a proper enquiry. Whether or not the termination of services in a given case is the result of the *bona fide* exercise of the power conferred on the employer by the contract or whether in

substance it is a punishment for alleged misconduct would always depend upon the facts and circumstances of each case. (Emphasis added.)

The second is *R.B. Diwan Badri Dass & Ors. v. Industrial Tribunal* AIR [1963] SC 630, where the same learned Judge had this to say (at p. 633):

The broad and general question raised by the learned Solicitor-General on the basis of the employer's freedom of contract has been frequently raised in industrial adjudication; and it has consistently been held that the said right is now subject to certain principles which have been evolved by industrial adjudication in advancing the cause of social justice. It will be recalled that as early as 1949, it was urged before the Federal Court in *Western India Automobile Association v. Industrial Tribunal Bombay AIR* [1949] FC 111 at p. 120, that the Industrial Tribunal had no jurisdiction to direct an employer to reinstate his dismissed employees and the plea made was that such a direction was contrary to the known principles which govern the relationship between master and servant. This contention was negatived by the Federal Court. Speaking for the Court, Mahajan J, as he then was, observed that the award of the Tribunal may contain provisions for the settlement of a dispute which no Court could order if it was bound by ordinary law, but the Tribunal is not fettered in any way by these limitations. The same plea was again raised before this Court in B*harat Bank Ltd, Delhi v. Employees of the Bharat Bank Ltd., Delhi* 1950 SCR 459 at p. 513 (AIR [1950] SC 188 at p. 209) and Mukherjea J, as he then was, emphatically rejected it.

"In settling the disputes between the employers and the workmen," observed the learned Judge, "the function of the Tribunal is not confined to administration of justice in accordance with law. It can confer rights and privileges on either party which it considers reasonable and proper, though they may not be within the terms of any existing agreement. It has not merely to interpret or to give effect to the contractual rights and obligations of the parties. It can create new rights and obligations between them which it considers essential for keeping industrial peace."

This view has been consistently accepted by industrial adjudication since 1949.

The doctrine of the absolute freedom of contract has thus to yield to the higher claims for social justice. Take, for instance, the case where an employer wants to exercise his right to employ industrial labour on any wages he likes. It is not unlikely that in an economically under-developed country where unemployment looms very large for industrial work, employees may be found willing to take employment on terms which do not amount to a minimum basic wage. Industrial adjudication does not recognise the employer's right to employ labour on terms below the terms of minimum basic wage. This, no doubt, is an interference with the employer's right to hire labour; but social justice requires that the right should be controlled. Similarly, the right to dismiss an employee is also controlled subject to well-recognised limits in order to guarantee security of tenure to industrial employees ... .

> It is, however, necessary to add that the general question about the employer's right to manage his own affairs in the best way he chooses cannot be answered in the abstract without reference to the facts and circumstances in regard to which the question is raised. If a general question is posed and an answer must be given to it, the answer would be both yes and no. The right would be recognised and industrial adjudication would not be permitted or would be reluctant to trespass on that right or on the field of management functions unless compelled by over-riding considerations of social justice. The right would not be recognised and would be controlled if social justice and industrial peace require such regulation. That is why we think industrial adjudication always attempts not to answer questions in the abstract in order to evolve any general or inflexible principles. The best course to adopt in dealing with industrial disputes is to consider the facts of the case, the nature of the demand made by employees, the nature of the defence raised by the employer and decide the dispute without unduly enlarging the scope of the enquiry. If in the decision of the dispute, some principles have to be followed or evolved that must be done; but care must be taken not to evolve larger principles which would tend to prejudge issues not directly raised in the case before the Industrial Tribunal.

A careful reading of the third award reveals that the learned Chairman adopted the wrong approach to the issue of victimisation. He asked himself the wrong question. He should have asked himself the question: "Does the totality of the evidence when objectively viewed reasonably support the conclusion that the services of the claimants were terminated because of their union activities?" Instead he appears to have asked himself an irrelevant question, namely, whether the respondents had positively proved victimisation. It is an irrelevant question because it is against established authority and imposed upon the respondents an unusually heavy burden to produce positive evidence in support of the claim of victimisation; a burden which the law does not impose.

We are of the view that, quite apart from the question being irrelevant, the conclusion arrived at on the issue of victimisation by the Industrial Court in the third award is bad for "Wednesbury unreasonableness." That is indeed also the view expressed by the learned Judge. And we are entirely in agreement with him.

Accordingly, the learned Judge was entirely correct in considering the merits of the decision itself and in concluding that the respondents had been victimised. By so doing he was not exercising, as suggested by Counsel for the appellants, any appellate power or acting in excess of the review jurisdiction. See, *Majlis Perbandaran Seberang Perai v. Tropiland Sdn. Bhd.* [1996] 3 CLJ 837; [1996] 3 AMR 3101.

Having carefully scrutinised the facts, the learned Judge concluded that the appellants had acted contrary to s. 10(2) of the Act which provides as follows:

No employer shall declare a lock-out or terminate the services of a workman once a trade union of workmen has served on the employer or a trade union of employers to which the employer belongs a claim for recognition under s. 9(2) in respect of workmen or a class of workmen:

Provided that this restriction shall not apply –

(a) where a dismissal is effected on disciplinary grounds; or

(b) where the claim for recognition has been resolved under s. 9(4A) or where a decision thereon has been made by the Minister under s. 9(5)

In our opinion, that conclusion is abundantly supported by the factual matrix of the case.

As we observed very early in this judgment, the appellants were most unhappy with the appearance of the union upon the premises of the first appellant. They were bent upon destroying the union. All that they did – the so-called sale of the first appellant to the second appellant, the making of the offers of employment and the alleged closure of the first appellant's business – was done merely in the pretended exercise of managerial power. The real aim of the whole charade was, apart from putting an end to the life of the union, to punish the respondents for their union activities. That they would contravene s. 10(2) of the Act does not seem to have bothered them in the least.

It is unfortunate that the Industrial Court in the third award, having found that the respondents were engaged in the protection of the union, failed to sufficiently appreciate the significance of its finding. Meaning no disrespect whatsoever to the learned Chairman who handed down the third award, his comments against the respondent have left us with the impression that it was quite wrong of the respondents to have sought to save the union from total destruction. Comments which carry such a tenor are wholly inappropriate when they come from the Chairman of a Tribunal which has been established to ensure the proper protection of the rights of workmen, whether unionised or not. It may lead one to assume, with good reason, that the particular Chairman is averse to the carrying out of union activities. And this is surely not so.

The result of the discussion thus far is that even if there was a closure of the first appellant, it was not *bona fide*.

Having thus disposed of the incidental question, we now turn to deal with the primary issue housed in the second proposition earlier formulated. It is this. Was there a closure of the first appellant on 21 September 1990?

Lobo argued that since the appellants relied on this fact, both in the letter of 21 September 1990 and in the statement of reply, as the ground for terminating the services of his clients, the burden was upon them to prove it. In support

of his argument, he relied upon the following passage in the judgment of Raja Azlan Shah CJ (Malaya) (as he then was) in *Goon Kwee Phoy v. J. & P. Coats (M) Bhd.* [1981] 2 MLJ 129, at p. 136:

> We do not see any material difference between a termination of the contract of employment by due notice and a unilateral dismissal of a summary nature. The effect is the same and the result must be the same. Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that Court to determine whether the termination or dismissal is with or without just cause or excuse. *If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse. The proper enquiry of the Court is the reason advanced by it and that Court or the High Court cannot go into another reason not relied on by the employer or find one for it.* (Emphasis added.)

It was submitted for the respondents that the appellants had hopelessly failed to establish the first appellant's closure on 21 September 1990. Our attention was drawn to the fact that the licence authorising the second appellant to carry on the operations previously carried on by the first appellant was only issued to the former on 22 October 1990. Lobo argued that it was inconceivable that the second appellant could carry on the manufacturing activities of the first appellant with effect from 21 September 1990, without a licence in that behalf.

There is considerable force in these arguments.

In our judgment, any reasonable Tribunal faced with the facts of this case would have found that the allegation that the first appellant had ceased its operations on 21 September 1990 to be unproven. Yet the third award made such a finding. The learned Judge came to quite the opposite conclusion based on the same material that was available to the Industrial Court. He was, in our view, entirely correct in so doing.

Having given this matter our most careful consideration, we were unable to detect any fault in the reasoning of the learned Judge. In the state of the undisputed facts and the uncontroverted documentary evidence, he had no alternative but to issue *certiorari* and to quash the third award. For our part, we were entirely in agreement with his conclusions. All that is left to be dealt with is the consequential order made by the learned Judge.

After having pronounced his decision quashing the award, the learned Judge, on the application of Lobo, made a consequential order remitting the matter to the Industrial Court for re-hearing. At the conclusion of the arguments on the appeal before us, we informed Counsel that we were inclined to dismiss

the appeal and inquired of them whether we might vary the consequential order made by the learned Judge.

Lobo argued that we could. He drew our attention to s. 69(4) of the Courts of Judicature Act 1964. That section reads as follows:

> The Court of Appeal may draw inferences of fact, and give any judgment, and make any order which ought to have been given or made, and make such further or other orders as the case requires.

Be it noted that the section empowers this Court not only to determine an appeal but also to make **any** order which ought to have been made, by which is meant, any order that the Court below ought to have made. Be it also noted that the section goes on to confer jurisdiction to make further or other orders as the case requires. We observe that the section has been used to considerable effect in the past by the former Federal Court. See, *Sungei Biak Tin Mines Ltd. v. Saw Choo Theng & Anor.* [1970] 2 MLJ 226.

In this context, we would also draw attention to r. 76 of the Rules of the Court of Appeal 1994 which provides as follows:

> The Court shall exercise, for all purposes incidental to or arising from any application or appeal, all the powers which, under the provisions of any written law in force in the place of trial at first instance, were vested in the trial Judge, whether before, during or after the trial, to the extent that such powers may be applicable to the circumstances of an application or appeal to the Court.

Nathan, however, argues that the respondents, having sought the consequential order which the Judge made, ought not now to be permitted to ask for its variation. With respect, we found ourselves being unable to agree with Nathan.

Once again we remind ourselves that the jurisprudence that has flowed since the learned Judge decided this case was not available to Counsel or the Judge at the time the order remitting the case to the Industrial Court was made. The position that obtained at the time the learned Judge handed down his decision was that our Courts treated themselves bound hand and foot by the course adopted by English Courts in cases where *certiorari* issued. Subservience to the foreign concept was so absolute that no regard was had to the provisions of our own written law, and, in particular, para. 1 of the Schedule to the Courts of Judicature Act 1964.

The fallacy that hitherto pervaded the field of public law remedies has now been exploded by the decision in *Rama Chandran v. The Industrial Court of Malaysia (supra)* where Eusoff Chin CJ declared the true position in the following terms:

> The High Court's jurisdiction should not be curtailed or narrowed or constricted by mere reference to the old historical development in which the writ of *certiorari* was developed and came to be granted by the Courts in England. Of course if the application for *certiorari* is dismissed, that ends the matter. *But if the application is allowed, the Court has surely to mould the order. If we were to merely grant certiorari to quash the Award and nothing more, this will deprive the writ of its vital and effective meaning and may result in grave injustice being caused to the claimant.*
>
> Having carefully considered the question, I am not persuaded by the submission of the learned Counsel for the society that we should remit the case to the Industrial Court with a direction to make the necessary consequential orders. As far as possible the anxiety and endeavour of the Court should be to remedy an injustice when it is brought to its attention. *On the facts of the case before us, to remit this matter back to the Industrial Court would mean to prolong the dispute which would hardly be fair or conducive to the interests of the parties. In the circumstances, justice demands that to avoid further delay and expense, we determine the consequential relief rather than remitting the case to the Industrial Court for that purpose.* (Emphasis added.)

A similar view was expressed by a member of this Court in *Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan (supra)*, at p. 543 of the report:

> ... the power of the High Court in the field of public law remedies is not confined to the grant of usual prerogative orders known to English law. Our Courts should not consider themselves to be fettered by those antiquated shackles of restrictive traditionalism which the common law of England has imposed upon itself. They are at liberty to develop a common law that is to govern the grant of public law remedies based upon our own legislation. They may, of course, be guided by the decisions of Courts of a jurisdiction which has an analogous provision. But ultimately, they must hearken to the provisions of our own written law when determining the nature and scope of their powers.
>
> In my judgment, the wide power conferred by the language of para. 1 of the Schedule enables our Courts to adopt a fairly flexible approach when they come to decide upon the appropriate remedy that is to be granted in a particular case. The relief they are empowered to grant is by no means to be confined within any legal straightjacket. They are at liberty to fashion the appropriate remedy to fit the factual matrix of a particular case, and to grant such relief as meets the ends of justice.
>
> Let me illustrate. Assume for a moment that an award of the Industrial Court upholding the dismissal of a workman is quashed by *certiorari*. The ordinary course – and this is the course that would be taken by an English Court – would be to remit the matter to the Industrial Court by way of *mandamus* to compel it to rehear the case. But the resultant delay and the inevitable result in the workman's favour may well be compelling factors to justify the award of relief by the High Court.

> In a proper case, I envisage no impediment to the High Court making the appropriate determination and awarding fair compensation to the workman. In such cases, it is difficult to see what possible good could come out of prolonging the agony of the parties to the dispute by delaying the matter and adding to the cause list of an already overworked Tribunal.

Nathan argued that the view expressed by the majority (Eusoff Chin CJ and Edgar Joseph FCJ) in *Rama Chandran* is wrong and that the minority view housed in the judgment of Wan Yahya FCJ accurately represents the law. And he invited us to so hold.

With respect, we are unable to accept this invitation and to disregard the majority view. Indeed, this Court is bound to follow and apply the law as stated by the majority in *Rama Chandran*, even if it suffers from any infirmity. It is a decision of the apex Court and constitutes binding precedent. Of course, if this Court takes the view that a particular decision of the Federal Court is plainly wrong, we are entitled, while applying it, to express our own misgivings about the accuracy of any proposition therein stated. But, as it happens, we are entirely satisfied, for reasons that we find unnecessary to go into, that the view expressed by the majority is correct.

There is, however, as was pointed out to Counsel during argument, an important point of difference between *Rama Chandran* and the instant appeal. In the former, the Industrial Court had found that the workman had been justly terminated from service. An application to the High Court for *certiorari* to have that finding quashed failed. On further appeal, the Federal Court unanimously reversed the High Court and directed *certiorari* to issue, with the majority concluding on the facts that the workman had been dismissed without just cause or excuse. The matter was therefore at large before the Federal Court, enabling that Court to make such further orders to give effect to its decision.

However, in the present case, we were merely dismissing the appeal. The usual orders made consequent to a dismissal are, costs apart, the affirmation of all orders made by the Court below: unless there is a cross-appeal, in which case this Court could re-open any orders made by the Judge. There was, in the instant case, no cross-appeal. The question then arises whether we are, in these circumstances, entitled to vary the order of the Judge remitting the case to the Industrial Court.

Lobo, relying on s. 69(4) of the Courts of Judicature Act has argued that we can. And Nathan, after due consideration, conceded that we could.

In our judgment, Counsels are entirely correct in the common ground upon which they stand. The broad language in which the section is cast, to which we have drawn attention earlier, amply supports the view that Counsel have

taken as to the powers this Court may exercise when allowing or dismissing an appeal.

We observe that the language of the section is similar, though not identical, to O. 41 r. 33 of the Indian Civil Procedure Code 1908 which, before its amendment in 1976, read as follows:

> The appellate Court shall have power to pass any decree and **make any order which ought to have been passed or made and to pass or make such further or other decree or order as the case may require,** and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objection. (Emphasis added.)

The words in the Rule to which we have lent emphasis resemble the following words appearing in s. 69(4):

> make any order which ought to have been given or made, and make such further or other orders as the case requires.

It follows, therefore, that cases decided by Indian Courts when interpreting r. 33 may be relied upon as a useful guide when seeking to determine the scope of the section. A study of the Indian decisions reveals that a common thread runs through them all. It is that the power is to be exercised in order to meet the justice of the particular case. See, for example *Tricomdas Cooverji Bhoja v. Gopinath Jiu Thakur* ILR 44 Cal. 759 (PC), per Lord Sumner at p. 769.

In G*anesh Ram v. Baikunthesh Prasad Singh & Ors.* AIR [1951] Pat. 291, 293, Ramaswami J explained the scope of r. 33 in language that so reflects our own views upon the reach of s. 69(4) that we would gratefully accept all that fell from him:

> The rule has been newly introduced in the Code of 1908. Its object is clearly to enable the Court to do complete justice between the parties. Its terms are very wide and in a proper case it gives the appellate Court ample discretion to pass any decree or make any order to prevent the ends of justice from being defeated. Having regard to the wide language of the rule it is not expedient to lay down any hard and fast rule regarding its true scope. Involving as it does an exercise of judicial discretion the question whether the Court should exercise the powers in a particular case would no doubt depend upon the special facts and circumstances of the case. It may be conceded that the discretion is not to be exercised in an arbitrary manner nor in such a way as to abrogate the other provisions of the Code with respect to the institution of appeals and cross-objections and the like. But there is ample authority for the view that the power contained in r. 33 extends to those cases where as a result of the appellate

> Court's interference with the decree in favour of the appellant further interference is required in order to adjust the rights of the parties in accordance with justice, equity and good conscience (see for instance, *Jawahar Banu v. Shujaat Hussain Beg* AIR [1921] All 367, and *Gangadhar v. Banabashi* AIR [1914] Cal 722).

All the Indian cases we have had an opportunity to peruse voice the same opinion as that expressed by Ramaswami J in the passage above-quoted.

We would add that *Muniappa v. Ramasetty & Anor*. AIR [1961] Mys. 166 is authority for the proposition that the powers under the Indian equivalent may be resorted to even when an appeal is dismissed. And this certainly accords with the view that forms common ground between Counsel before us in this appeal upon the extent of this Court's power under s. 69(4).

Based upon the foregoing discussion, we are satisfied that this Court may, in a proper case make consequential orders even after dismissing an appeal in order to achieve complete justice.

With that, we now turn to address the question whether we ought to vary the order of the learned Judge whereby he remitted the case to the Industrial Court for re-adjudication, and if so, the type of consequential relief that best suits the justice of the present case.

In order to carry out this task, we remind ourselves of the finding by the learned Judge that the appellants had victimised the respondents because of the latter's trade union activities – a finding amply justified by the objective facts of the case. He also held, as a matter of pure logical sequence, that the purported termination of the respondents' services amounted to a dismissal without just cause or excuse. We have affirmed these findings.

Having due regard to the foregoing, we were satisfied that the ends of justice would not be met by remitting the matter to the Industrial Court. Some six years have passed since the appellants wrote their letter terminating the services of the respondents. If we were to affirm the remission of the case to the Industrial Court, it may take another six years or more for the matter to reach us, with a possible further appeal to the Federal Court. Such a consequence would produce the diametrically opposite result to that intended by Parliament, namely, the speedy adjudication and settlement of trade disputes. And we are unable to see any justification for prolonging the agony of the respondents. The case therefore warrants the variation of the order made by the learned Judge by the making of appropriate consequential orders.

We have before us a case of an employer who has chosen to dismiss his workmen purely because of their trade union activities. There can, in our judgment, be no clearer case of victimisation and unfair labour practise. And

we are once again reminded of the passage in the judgment of Gajendragadkar J in the *Assam Oil* case which we have earlier quoted.

In the circumstances of the case, we do not consider that compensation is the proper remedy. For, otherwise, employers will be encouraged to terminate the services of their unionised workmen, confident in the expectation that all they have to face is an award of compensation – a small price to pay for being rid of trade unionists. The remedy of reinstatement is therefore the only just and proper remedy that is appropriate to meet the facts and circumstances of the present case.

In order to satisfy ourselves that we were not straying from the well-trodden path, we asked of Nathan whether, in a case such as the present, the usual remedy which industrial equity awards is the reinstatement of the dismissed workman. Counsel, with his customary frankness, readily advised us that that was indeed the case.

Having come to the conclusion that the appeal was devoid of merit, we dismissed it with costs. We also affirmed the order of the learned Judge quashing the third award. The deposit lodged in Court by the appellants was ordered to be paid out to the respondents to account of their taxed costs.

In view of the peculiar facts of this case, we varied the order of the Judge remitting the case to the Industrial Court to the following extent:

(1) all the respondents are hereby forthwith reinstated to the second appellant with no loss of seniority or benefits, monetary or otherwise;

(2) all the respondents are to report for work at the premises of the second respondent at 8a.m. on 1 October 1996, and those who so fail to report shall lose the benefit of this judgment, save for the order as to costs;

(3) the reinstatement need not be to identical posts as those previously held by the respondents or any of them in the first appellant, but may be to a similar or an equivalent post;

(4) there shall be general liberty to both parties to apply to the High Court in the carrying out of this order.

Reported by Tey Tsun Hang